NO. 82-16

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAY BALL,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit
(No. 81-5546)

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The District Court committed reversible error in handling the situation of Jurors Bowman and Phillips. The procedure implemented by the District Court denied the petitioner an impartial jury.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Jay Ball, prays that a writ of certiorari issue to review the opinion and judgement of the United States Court of Appeals for the Sixth Circuit entered against the petitioner on May 7, 1982.

OPINIONS BELOW

There were two opinions in the United States District Court for the Eastern District of Tennessee. Two copies of the District Court relative to the jurors appear at Appendix, infra p. A - 1.

The opinion of the Court of Appeals appears at Appendix, infra p. A9.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) to review the order of the United States Court of Appeals for the Sixth Circuit entered on May 7, 1982.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Constitutional Provision involved in this matter is the Sixth Amendment right to trial by an impartial jury.

The petitioner was convicted of violating 18 U.S.C. Section 2313.

The Sixth Amendment provides:

"RIGHTS OF THE ACCUSED. - In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. Section 2313 provides:

Whoever receives, conceals, stores, barters, sells or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000.00 or imprisoned not more than five (5) years, or both.

STATEMENT OF THE CASE

This is an appeal by the petitioner, Jay Ball, hereinafter referred to as Ball from a conviction in the United States District Court for the Eastern District of Tennessee, Northeastern Division, Judge Charles G. Neese, presiding on a ten count indictment charging the petitioner, Ball, with ten counts of selling various stolen motor vehicles over a 13 month period in

violation of 18 U.S.C. Section 2313.

As a result of the hereinabove mentioned indictment the District Court on April 9, 1981 issued a probation revocation warrant to Ball based on a conviction on June 20, 1969 for violations of 26 U.S.C., Sections 5179, 5173, 5205(a)(2) and 5604 (a)(1). (U.S.A. v. Jay Ball, No. 7045).

On May 18, 1981, a jury trial commenced resulting in a guilty verdict on ten counts in Cr. 2-81-09 on May 27, 1981. Ball filed a timely motion for new trial which was denied on June 16, 1981.

After a presentence investigation, Ball was sentenced on July 15, 1981. He was committed for imprisonment for five (5) years on Count I, and five (5) years on Count II of the indictment, said sentences to be served consecutively. Imposition of sentence on Counts III-X was suspended and he was placed on probation for five (5) years, consecutive to the terms of imprisonment.

Ball was also sentenced on No. 7045, receiving a committed sentence of five (5) years consecutive to the sentence in CR. 2-81-09. On July 15, 1981, Notice of Appeal was timely filed.

On May 7, 1981, the Sixth Circuit Court of Appeals issued an opinion affirming the District Court conviction.

REASONS FOR GRANTING THE WRIT

The petitioner was denied an impartial jury as graranteed by the Sixth Amendment of the United States Constitution.

Both the District Court and Court of Appeals have erroneously held that the petitioner was accorded a fair and impartial jury.

After the jury panel had begun to hear testimony, during the eventing of May 18, 1981 juror 52, Bowman, received a telephone call at his home from an unidentified caller.

The gist of the caller's conversation was that such caller understood that Mr. Bowman was under instruction not to discuss this case, but that there "is a lot ov money floating around" in connection with it. Mr. Bowman replied that he was not interested and concluded the conversation.

It should be noted that Juror Bowman did not report this incident until May 21, 1981. He sat through testimony while trying to decide what to do about the incident. He then reported the incident on the morning of May 21, 1981.

Prior to the commencement of trial, Ball's attorney stipulated in writing that a valid verdict might be returned by less than 12 jurors should the court find it necessary to excuse one or more jurors for any just cause after the trial herein commences, provided, the Court consults with counsel of record for the plaintiff and each defendant herein before determining the existence of such just cause.

An evidentiary hearing was held in chambers with the petitioner and

his attorneys present. Juror Bowman stated that he was uninfluenced by the call and that he could remain a fair and impartial juror. Bowman did not state as to whether or not he had been influenced while listening to the testimony after the call.

The petitioner moved to dismiss Juror Bowman. The District Judge denied the motion to remove.

Betty J. Phillips was elected the original foreperson after the jury began to deliberate.

The District Judge summarily excused Mrs. Phillips over the objections of defense counsel that he did not want to waive any material matter. Defense counsel further requested that in the event Mrs. Phillips was removed that Bowman also be removed. The District Court refused this request.

The trial judge refused to remove Juror Bowman after prejudicial contact had been established. The only conclusion that Bowman could possibly have drawn was that the petitioner or someone in his behalf initated such contact. There is a presumption that such private conversation by the caller with a juror was prejudical to the petitioner. Remmer v. United States, 347 U.S. 229. This is, however, a rebuttable presumption. Albeit, a rebuttable presumption, the burden rests heavily on the government to overcome such presumption.

The District Judge, without conducting a hearing, determined that foreperson Phillips had become disqualified to perform her duty as fair and impartial juror from facts and circumstances never sworn to. Juror Phillips was not allowed, as was Bowman, to explain whether or not she was an impartial juror.

As was stated in United States v. Doe, 513 F.2d 709 (1st. Cir. 1975), if the court finds that a communication between jurors and a third party has occurred, it must determine whether or not it was prejudicial and develop a record that affords an adequate basis for review. This procedure was following in juror Bowman's case but was abandoned in Foreperson Phillips' case. U.S. v.Richman, 600 f.2d. 286 (1st Cir. 79).

Juror Bowman had already received an outside communication. When foreperson Phillips was excused with no explanation to the jury, it could only serve to indicate to Juror Bowman that the attempts to bribe members of the jury was still being pursued. Leaving Bowman, after excusing Phillips, had to only benefit the government.

In the case of United States v. Forrest, 620 f.2d. 446 (5th. Cir. 1980) the Court stated:

"When there had been an attempt at jury tampering, the court must guard against the possibility that the jury will assume one of the parties was responsible for the attempt, and, based on that assumption, decided the merits of the case unfavorably to that party. Stimack v. Texas, 548 F.2d. 588 (5th. Cir. 1977); United States v. Herring, 568 F.2d 1099 (5th. Cir. 78) (conviction reversed because jury had been exposed to

newspaper report that life of government witness had been threatened). The Court must also guard against the possibility that the tampered with juror will comment on the merits of the case in the presence of the other jurors. United States v. Ferguson, 486 F.2d 968 (6th. Cir. 1973). Whether the comments are favorable or unfavorable to the defendant is immaterial. (Emphasis supplied).

In the Forrest, supra case the court further provided: "It makes no difference in this case that it was Forrest himself who initiated the contact that may have poisoned the jury. We reject the suggestion that Forrest may not be heard here to complain of the results of his own misconduct. He has been convicted of jury tampering and for that misconduct is subject to punishment. That is an entirely discrete matter. At issue in his trial in this case whether Forrest had dealt in stolen goods, not whether he had tried to corrupt the judicial system. A fair and impartial jury cannot be permitted to draw the conclusion that because defendant attempted to fix his trial, he is guilty of the offense for which he is being tried. It is conceivable that a defendant, innocent of the charge being, might attempt to tamper with a jury to assure a favorable verdict."

The petitioner submits that:

(1)Impermissible contact was had with Juror Bowman;

(2) That the governmant failed to establish that the conduct with Juror Bowman was not prejudicial.:

(3) That no contact with Juror Phillips was ever established;

(4) That the trial judge committed reversible error in excusing Juror Phillips without an investigation;

(5) That leaving Juror Bowman on the jury after excusing Juror Phillips only served to highlight to Juror Bowman what he already knew; that there were attempts to bribe the jury.

(6) That the Sixth Circuit Court of Appeals ruling that the alleged misconduct of the petitioner should not require a reversal and a new trial flies in the face of the Sixth Amendment to the United States Constitution and holdings of other circuits.

The Sixth Circuit Court of Appeals characterized the proof as "overwhelming". The case involved whether or not the petitioner knew the vehicles were stolen when he sold them. The petitioner never denied selling the vehicles only that he knew they were stolen. The only direct proof of knowledge of the character of the vehicles came from one government witness, William Coffey. The case boiled down to the testimony of William Coffey versus Jay Ball.

CONCLUSION

Petitioner urges that the question presented needs to be settled by the Court. It needs to be made clear what is required of a trial judge in circumstances where contact with jurors have been made or alleged.

Respectfully submitted,

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